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BEFORE THE
SURFACE TRANSPORTATION BOARD

WEST POINT RELOCATION, INC. and ELI COHEN – PETITION FOR DECLARATORY ORDER	: : :	**Docket No. 35290**

REBUTTAL STATEMENT IN SUPPORT OF PETITION FOR DECLARATORY ORDER

The thrust of Horizon Lines LLC's ("Horizon's") opposition to the Petition for Declaratory Order of West Point Relocation, Inc ("West Point") and Eli Cohen ("Cohen"), is that it is reasonable for carriers to hide within their tariffs the fact that they are seeking to impose personal liability upon undefined "principals" of corporations for whom they are providing transportation services, or else the carriers may not be able to recover their transportation costs. Horizon further suggests that its tariffs and all of their various terms and conditions are enforceable regardless of whether the party has actual notice of such provisions. Finally, Horizon suggests that the Board should address this question in the context of a rulemaking, rather than as part of an adjudication. None of these contentions can withstand scrutiny.

First, Horizon's argument ignores the fact that carriers have ample means of ensuring that their transportation charges are paid without disregarding centuries of Anglo-American jurisprudence upholding the legal distinction between corporations and their "principals," officers, directors and/or shareholders. *Second*, Horizon's argument ignores well-established case law holding that the filing of a tariff gives constructive notice of only those matters that are required by law to be filed -- particularly when the term or condition sought to be enforced seeks to impose onerous obligations that are contrary to established law or practice. Here, Horizon's practice of simply referring to

unspecified tariff terms and conditions in its invoices in order to impose personal liability on "principals" of corporations fails to provide actual notice to corporate officers and directors that they are personally assuming the obligations of the corporation. *Third*, even if contracting parties were able to locate the tariff of Horizon's that governed the shipments at issue, the tariff is ambiguous in failing to define who is a "principal of said liable parties." *Finally*, given that the United States District Court Judge entered an order referring the issue of the reasonableness of the challenged Horizon tariff rules to the Board under the primary jurisdiction doctrine, and given that Horizon did not oppose such a referral, it would be inappropriate for the Board to refuse to adjudicate the matter but instead to institute a rulemaking.

Carriers Are Able to Protect their Rights Without Deception and Trickery

Horizon relies upon language in its bills of lading to justify imposing personal obligations on the "principals" of corporate entities with which Horizon contracted. The undisputed facts, as reflected in the Declaration of Eli Cohen, however, confirm that Horizon never submitted such bills of lading to West Point or to Cohen. *See* Cohen Aff. at ¶ 4. Instead, Horizon simply submitted invoices and freight bills to West Point that contained no terms and conditions but instead had a small print notation referring to Horizon's tariffs. *See* sample invoice attached as Exhibit B to Petitioners' Opening Statement; Cohen Aff. at ¶ 6. Thus, not only was the tariff rule on which Horizon relies never provided to West Point or Cohen, the individual tariff at issue was not even identified. *Id.* at ¶ 6.

Horizon tries to justify its position by asserting that unless carriers are allowed to enforce the terms of their tariffs as written, the carriers will be at the tender mercies of

"impecunious forwarders." Opp Statement at 3. Such an argument ignores the fact that carriers are perfectly capable of protecting themselves from shippers and forwarders failure to pay freight charges through the exercise of simple due diligence. As reflected in the Petitioners' Opening Statement, if Horizon had a legitimate desire to impose personal liability on Mr. Cohen or other corporate officers it easily could have done so by requiring them to sign a contract guaranteeing the obligations of the corporate entity. The tariff upon which Horizon relies specifically provides that the carrier may extend credit upon the completion of a credit application in which the signatory "unconditionally guarantees to Carrier payment of all ocean freight and related charges due. . ." Tariff at ¶ 7.[1] Here, however, rather than take such an honest and straightforward approach, Horizon opted to slip the word "principals" into its tariff thereby seeking to impose personal liability upon unsuspecting individuals.

Carriers also are free to protect themselves from unpaid transportation charges by exercising their lien rights and not releasing goods until such charges have been paid. The Uniform Commercial Code (the "UCC") provides explicit protections for carriers under situations such as the one presented here. Section 7-307 of the UCC provides that:

> (a) A carrier has a lien on the goods covered by a bill of lading or on the proceeds thereof in its possession for charges after the date of the carrier's receipt of the goods for storage or transportation (including demurrage and terminal charges) and for expenses necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law. . . .

[1] Incredibly, Horizon suggests that allowing it to engage in this duplicitous practice is actually in the shipper's interest because it relieves shippers of burdens that would attend more complex credit and collection methods. Opp. Brief at 7. The Petitioners submit that common sense dictates that individuals acting on behalf of corporate entities are entitled to be informed that they are assuming liability for corporate obligations and to have the opportunity to make their own decision as to whether they want to assume that obligation.

Carriers can further protect themselves from the risk of unpaid freight charges by utilizing contractual liens. Courts have consistently held that carries have a lien on cargo transported on their vessels for unpaid freight. *See, e.g., Logistics Management, Inc. v. One Pyramid Tent Arena* (9th Cir. 1996). The carrier can preserve this lien via contract or bill of lading. *Id.*

Under these circumstances, carriers have ample opportunity to protect themselves against the possibility of unpaid freight charges. Accordingly, there is no legitimate basis for discarding a fundamental precept of Anglo-American jurisprudence and imposing personal liability upon unspecified "principals" --which presumably includes officers, directors and shareholders -- acting on behalf of a corporate entity for the corporation's obligations, particularly without providing them any meaningful notice that they are assuming such personal obligations.

Carriers Must Provide Actual Notice of Tariff Provisions That Are Not Mandated by Law.

As reflected in the Petitioners Opening Statement, the overwhelming weight of legal authority establishes that although the rates set in valid tariffs have the force of law, actual notice must be provided to shippers when terms and conditions are contained therein that are not required to be included in the tariff by law. *See, e.g., Comsource Independent FoodService Comp. Inc v. Union Pac. R.R. Co*, 102 F.3d 438, 443 (9th Cir. 1996) (the filing of a tariff gives constructive notice of "only those matters that are required by law to be filed."); *Fine Foliage of Florida Inc v. Bowman Transp., Inc.*, 901 F.2d 1034, 1041(11th Cir. 1990) (non-mandatory provisions in tariffs filed by carriers ineffective when actual notice is not given to carrier).

In *Encyclopaedia Britannica, Inc. v. SS Hong Kong Producer*, 422 F.2d 7, 14 (2nd Cir. 1969), the Second Circuit recognized that because it is impractical for a shipper to be compelled to make a detailed study of the fine print clauses of the carrier's bill of lading, absent an explicit warning on the face of bills of lading or invoices that the shipper is assuming an abnormal risk, such provisions are unenforceable; *see also*, *La Salle Machine Tool, Inc. v. Maher Terminal, Inc.*, 452 F. Supp. 217, 223 (D. Md. 1978) (rejecting defendant's argument that the filing of a tariff with the Federal Maritime Commission gave constructive notice of the provisions in tariff; "when a company desires to impose special and most stringent terms upon its customers . . . there is nothing unreasonable in requiring that those terms shall be distinctly declared and deliberately accepted)"; *Toledo Ticket Co v. Roadway Express, Inc.*, 133 F.3d 439, 443 (6th Cir. 1998) (in order to provide shipper with reasonable notice, carrier must affirmatively bring provision to the shipper's attention and cannot satisfy its heavy burden "by simply alluding to language on file with the ICC as part of its tariff"); *Atlantic Mutual Insur. Co. v. Companhia de Navegacao Maritima Netumar*, 113 Misc. 2d 516, 499 N.Y.S. 2d 588 (Civ. Ct. N.Y. 1982) (absent actual notice of tariff provision, limitation of liability clause set out in tariffs is unenforceable); *Caribbean Produce Exchange Inc. v. Sea Land Service, Inc.*, 415 F. Supp. 88, 94 (D. P.R. 1976) (refusing to enforce provision only contained in tariff and long-form bill of lading because nothing to alert shipper to terms at issue).

Here, rather than address the legal authority establishing that carriers must provide actual notice to shippers before imposing special and stringent terms, Horizon cites cases standing for the unremarkable proposition that *rates* set forth in a tariff are

legally binding. *See* Opp. Brief at 7, *citing, Reiter v. Cooper*, 507 U.S. 258, 270 (U.S. 1993) (tariff *rates* not disapproved by the ICC are legal rates); and *Gilbert Imported Hardwoods v. 245 Packages of Guatambu Squares*, 508 F.2d 1116, 1121 (5th Cir. 1975) ("*rate* must be charged and paid regardless of mistake, inadvertence, or contrary intent of the parties"). The Petitioners, however, do not dispute that the rates set forth in Horizon's tariff are enforceable. Instead, Petitioners rely upon well-established law that Horizon cannot impose radical, new obligations upon its customers without providing them with actual notice that it is doing so.

In this instance, the language in Horizon's tariff seeks to override Anglo-American jurisprudence that for well over a century has insulated officers and directors from personal liability for the obligations of corporate entities. Thus, the language in its tariff that that Horizon now seeks to enforce constitutes a radical departure from existing law. Rather than expressly informing shippers that it is seeking to impose personal liability upon undefined principals of the corporation, Horizon buries a cryptic reference to principals in its tariffs. It then sends invoices which contain generic references to Horizon's tariffs, but do not specify which tariff is applicable, let alone identify the specific "rule" that purports to impose liability for freight charges on undefined corporate principals. The Board should not uphold such a cynical gambit as a reasonable practice.

In its Opposing Brief, Horizon attaches a Verified Statement from Patrick Daugherty, an Accounts Payable and Revenue Recovery Manager for Horizon, who states that Horizon's tariffs have been available on its website since 2003. Daugherty Statement at 6. Mr. Daugherty's primary job responsibility appears to be seeking payment from delinquent accounts. *Id.* at ¶ 3. The Daugherty Statement reveals that

Horizon has sixteen (16) different tariffs that can be accessed on-line. Nonetheless, he states, with no supporting documentation, his opinion that shippers and forwarders "routinely consult" the published tariff to determine rates and conditions of carriage. *Id.* at ¶ 7. He then further opines, again without supporting documentation or evidence, that "[g]enerally speaking, repeat customers in any given trade lane are very familiar with all aspects of Horizon's tariffs."[2]

The notion that such information is readily available and accessible to shippers and forwarders is belied by the actual evidence in this case. As noted in Petitioners Opening Statement, Horizon never identified in its invoices which of their sixteen tariffs it was relying upon to impose personal obligations upon corporate "principals." Further, despite Mr. Daugherty's bland assurances that such tariffs are readily available, Horizon's own lawyer, who specializes in transportation law, was unable to determine which of Horizon's many tariffs governed the transportation in question. *See* Cohen Aff. at ¶ 7.

Before Horizon is permitted to impose legal obligations that fly in the face of centuries of Anglo-American jurisprudence, it must, at a minimum, provide actual notice to the party assuming the legal obligation that it is doing so. "[W]hen a company desires to impose special and most stringent terms upon its customers . . . those terms [must] be distinctly declared and deliberately accepted." *La Salle Machine Tool, Inc v. Maher Terminal, Inc.* 452 F. Supp. at 223. Here, having failed to do so, it is an unreasonable

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[2] The credibility of Mr. Daugherty's statements is further undermined by his representation that WPR Hawaii, Inc, is a successor to West Point. *Id.* at ¶ 23. *See also* Opp. Brief at page 6, stating that WPR, Inc is new company that formed, *citing* Daugherty Statement at ¶ 23. In fact, as reflected in the attached document taken from Hawaii's online public records site, WPR, Inc. was formed in 2006, long before the dispute in this matter arose. *See* WPR Hawaii, Inc. public records attached as Exhibit A. Documents from the same site also reveal that since at least January 20, 2009, Sigal Cohen, not Eli Cohen, was an officer of the corporation.

practice for Horizon to seek recovery against Cohen, as opposed to the corporate entity it contracted with, West Point.

The Term Principal is Ambiguous and Must Be Construed Against Horizon

In their Opening Statement, Petitioner asserted that Horizon's tariff should not be construed to apply to Mr. Cohen because Horizon never defines the term "principal." Other than noting that at one point West Point used the term principal on a bankruptcy form in regard to Mr. Cohen, Horizon ignores the issue and provides no explanation as to what its intent was in inserting the term "and principals of said liable parties" into its tariff.

The simple truth is that one can only guess what is meant by the term "principal" in Horizon's tariff. Indeed, a review of *Black's Law Dictionary* (Sixth Edition) confirms the uncertainty of its meaning in this context. Although *Black's* has a number of definitions of principal, none would appear to have any applicability to this situation. Thus, a principal is identified as the source of authority or right, such as a superintendent of a school. A principal is also identified under the law of agency as one who has permitted or directed another (*i.e.*, agent or servant) to act on or for his benefit and subject to his direction. Definitions are also provided in regard to a principal and surety and a principal under trust law. Finally, there are a number of references in *Black's* to principals under criminal law, such as a principal versus an accessory, that are obviously inapplicable. Again, none of these definitions appear to relate to what Horizon might have meant to encompass by the term principal in its tariff. Thus, shippers, forwarders (and the Board) are provided no guidance as to what the term might encompass.

Without ever defining the term, Horizon's Opposing Brief does argue that its tariff binds shareholders of West Point in addition to West Point itself. *Id.* at 4. Thus, Horizon implicitly suggests that the term "principal" encompasses shareholders, or at least large shareholders, of corporate entities. Taken to its logical conclusion, Horizon's position appears to be that if it transports goods on behalf of General Electric, Horizon can seek recovery not only from General Electric but also can bring an action against any one of General Electric's thousands, or perhaps millions, of shareholders to collect Horizon's freight charges. The Petitioners respectfully submit that if that is Horizon's position, such a practice should be condemned as unreasonable. Alternatively, if Horizon's definition of principal does not encompass corporate shareholders, it either does not apply to Mr. Cohen, or is so ambiguous as to fail to provide meaningful guidance as to who is encompassed within the term.

The Board Should Decide the Issue Presented

This Petition presents a straightforward legal question of whether it is a reasonable practice carriers to impose obligations upon principals of corporate entities without providing them with actual notice that they are assuming such obligations. Horizon now asserts that the Board should refuse to address this issue in this context but instead must decide the matter via a rulemaking. There is no legitimate basis for the Board to refuse to address the matter in this context.

On June 25, 2009, the defendants in *Horizon Lines LLC v. West Point Relocation a/k/a West Point Relocation Inc. and Eli Cohen*, U.S.D.C. C.D. Cal., CV 08-6362 RSWL (JTL), moved to refer the question to the Board of whether it is a reasonable practice for Horizon' tariff rules to disregard the existence of corporate entities and to seek to hold

officers, directors, and principals liable for the actions of the corporation. Subsequently, on July 17, 2009, the parties to the lawsuit stipulated that the Board has exclusive jurisdiction to determine the reasonableness of the tariff provisions. The parties, including Horizon, further stipulated that to avoid wasting the parties and the Court's time and resources, the matter should be taken off of the Court's docket pending the Board's resolution of the reasonableness of Horizon's tariff. As a result, the United States District Court entered an Order on July 20, 2009, referring the issue of the reasonableness of the challenged Horizon tariff rules to the Board under the primary jurisdiction doctrine. The Order stayed the lawsuit as to Mr. Cohen.

Despite having stipulated that the Board should resolve the question presented in this context, Horizon has now reversed course and argues that it would be an abuse of discretion for the Board to decide the issue by adjudication rather than by rulemaking. *See* Reply Brief at 8. Horizon asserts that the Board should decide the matter as a rulemaking because: 1) it would be unfair for Horizon to now discover that the Board does not countenance its practice of failing to disclose to corporate principals that they are being personally held liable for the corporate entity's transportation charges; and 2) rulemaking would enhance efficiency by avoiding the needless cost and delay in finding legislative facts through trial-type procedures. *Id.* at 9. Neither of these contentions can withstand scrutiny.

First, as reflected in the Petitioners' Opening Statement, as well as above, carriers have long been on notice that when they desire to impose special and stringent terms upon their customers, those terms must be distinctly declared and deliberately accepted. *La Salle Machine Tool, Inc v Maher Terminal, Inc*, 452 F. Supp. at 223. Having

ignored that well-established precedent, Horizon cannot now in good faith complain that they did not know they were not allowed to dupe their customers.

Horizon's second argument is equally flawed. As even Horizon concedes in its Reply Brief, the facts are not in significant dispute. *See* Reply Brief at 4. Instead, the only dispute is of the legal significance of those facts. *Id.* Thus, the matter is perfectly framed for the Board's determination. For the Board to now refuse to resolve the question posed and instead to institute a rulemaking procedure would be unfair to the parities and to the United States District Court and would impose unnecessary cost and delay in resolving an important legal question.

CONCLUSION

It is not a reasonable practice for Horizon to disregard the existence of West Point, with whom it contracts, in order to assert personal liability against a corporate officer of West Point, and to do so unilaterally without proving any meaningful notice to the corporate officer that it seeks such relief. Accordingly, the Board should declare Horizon's tariff rule unreasonable. At a minimum, given that Horizon fails to define who is a principal subject to personal liability pursuant to its radical new approach to corporate law, Eli Cohen should not be construed to fall within the scope of Horizon's tariff rule.

Respectfully submitted,

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DATE: February 5, 2010

CERTIFICATE OF SERVICE

I do hereby certify that I have delivered a true and correct copy of the foregoing document to the following addressee by depositing same in the United States mail, first class postage prepaid, or by email transmission, this 5th day of February 2010:

Jonathan Benner
REED SMITH
1301 K Street, NW – Suite 1100
Washington, DC 20006

Attorneys for
HORIZON LINES LLC

EXHIBIT A

Home - BREG
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WPR HAWAII, INC.

DOMESTIC PROFIT CORPORATION

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OTHER FILINGS BUY AVAILABLE DOCS

General Info

VIEW AND PRINT COMPANY INFO

This business is not in good standing.

MASTER NAME	WPR HAWAII, INC.
BUSINESS TYPE	Domestic Profit Corporation
FILE NUMBER	214607 D1
STATUS	1
PURPOSE	TRUCKING AND GENERAL DELIVERY BUSINESS,
PLACE INCORPORATED	Hawaii UNITED STATES
INCORPORATION DATE	Feb 1, 2006
MAILING ADDRESS	590 FARRINGTON HIGHWAY UNIT 524-207 KAPOLEI, California 96707 UNITED STATES
TERM	PER
AGENT NAME	ROBERT E. CHAPMAN, ESQ.
AGENT ADDRESS	700 BISHOP ST STE 2100 HONOLULU, Hawaii 96813 UNITED STATES

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Officers

NAME	OFFICE	DATE
COHEN,SIGAL	P/V/S/T/D	Jan 20, 2009